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In the Supreme Court of the United States

October Term, 1986

NU-CAR CARRIERS, INC.,
Petitioner,

VS.

LARRY T. VARNUM,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Eleventh Circuit

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18 pp

QUESTION PRESENTED

Whether a common law cause of action for fraudulent misrepresentation is preempted by Section 301 of the Labor-Management Relations Act or by the National Labor Relations Act where: (1) The employer's representations were made to the plaintiff prior to his employment at a time when he was neither an employee or member of a collective bargaining unit, and (2) at the time the representations were made by the employer, the employer knew that the representations were false, the employer knew that the plaintiff would rely on these representations, and the plaintiff did rely on these representations and suffered damage as a result.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Eleventh Circuit

The Respondent, Larry T. Varnum, respectfully prays that the Petition for a Writ of Certiorari filed by the Petitioner on March 23, 1987, in the above-captioned matter, to review that judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in the above-captioned matter, bearing Case No. 85-3898, on the 20th day of November, 1986, be denied.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit in Case No. 85-3898 is reported at 804 F.2d 638 and is reproduced in the Petitioner's Appendix at A1 to A18.

The Opinion of the United States District Court for the Middle District of Florida in Case No. 84-1416-Civ-J-14 was delivered orally by the Court on October 22, 1985, at the hearing conducted on Defendant Nu-Car Carrier, Inc.'s Motion for Summary Judgment. The transcript of the Motion for Summary Judgment announcing the unreported Opinion of the Court is reported in the Petitioner's Appendix at A20 to A49.

The Judgment of the United States District Court for the Middle District of Florida in Case No. 84-1416-Civ-J-14 is reproduced in the Petitioner's Appendix at A19.

Respondent's complaint was initially filed in State Court of the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida as Case No. 84-14461-CA. The complaint was subsequently removed by Nu-Car to the United States District Court for the Middle District of Florida. The final judgment of dismissal of the Florida Circuit Court is reproduced in the Petitioner's Appendix at A50.

The Opinion of the United States Court of Appeals for the Eleventh Circuit in Case No. 85-3898 is reproduced in the Petitioner's Appendix at A51.

JURISDICTION

The Respondent objects to the Petition for Writ of Certiorari to review that judgment and opinion of the Eleventh Circuit Court of Appeals issued on November 20, 1986, on the grounds that it was not timely filed and therefore should be denied.

The Petitioner filed a timely Petition for Re-Hearing En Banc on December 10, 1986, an Order of the Court of Appeals was entered denying said Petition on December 24, 1986, which is reproduced in Petitioner's Appendix at A53 and A54. The filing of this Petition for Writ of Certiorari is not timely pursuant to U.S.Sup.Ct.R. 20.1, which states:

"A Petition for Writ of Certiorari to review the Judgement in a criminal case of a State Court of last resort or of a Federal Court of Appeals shall be deemed in time when it is filed with the Clerk within *60 days* after the entry of such judgment." (emphasis added).

Further, U.S.Sup.Ct.R. 20.4, states in relevant part that:

"The time for filing a Petition for Writ of Certiorari runs from the date the Judgment or decree sought to be reviewed is rendered and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a Petition for Re-hearing is timely filed by any party in the case, *the time for* filing the Petition for Writ of Certiorari for all parties (whether or not they requested rehearing or joined in the Petition for Re-hearing) runs *from the date of the denial of re-hearing or of the entry of a subsequent judgment entered on the re-hearing.*" (emphasis added).

Therefore, in this instance, the time for filing the Petition for Certiorari began to run from December 24, 1986, and sixty days thereafter. On February 25, 1987, the time for filing this Petition for Writ of Certiorari had ended.

STATUTORY PROVISIONS INVOLVED

Labor-Management Relations Act of 1947 Section 301(a), 29 U.S.C. Section 185(a):

Suits for violation of contracts between an employer and any labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount of controversy or without regard to the citizenship of the parties.

National Labor Relations Act Section 99(a), 29 U.S.C. Section 159(a):

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, that the bargaining representative has been given opportunity to be present at such adjustment.

STATEMENT OF THE CASE

The Respondent, Larry T. Varnum, (hereinafter referred to as the "Respondent-Varnum"), was a truck driver who sought employment from the Petitioner, Nu-Car Carriers, Inc., (hereinafter referred to as the Petitioner-Nu-Car), a common carrier engaged in the transport of new cars. In order to gain employment with the Petitioner-Nu-Car, a trucker must first, prior to his employment purchase his own equipment, including a certain type of tractor-trailer not more than two years old, which equipment costs approximately $60,000.00. The Respondent-Varnum negotiated with a representative of the Petitioner-Nu-Car in May, 1983, regarding prospective employment. During their discussions, the representative told the Respondent-Varnum that the Petitioner-Nu-Car allocated work

according to a first-in-first-out basis that provided equal work opportunities to truckers regardless of their seniority. The truckers were paid about 65% of the gross amount that the Petitioner-Nu-Car received for each load the truckers transported.

The statement concerning the dispatch seniority system was consistent with the Collective Bargaining Agreement in effect at the time between the Petitioner-Nu-Car and the Union representing the Petitioner's employees.

The representative also showed the Respondent-Varnum computer print-outs that indicated that the average monthly gross income for truckers with the Petitioner-Nu-Car, based on the past few months, had been approximately $7,000.00. The information contained in these print-outs was correct as of that time.

While the Respondent-Varnum was negotiating for his prospective employment with the Petitioner-Nu-Car, the Petitioner was in the process of drafting a proposal to change from the first-in-first-out basis of dispatch to a seniority-based dispatch system. Under this dispatch system, new loads would be assigned to the most senior trucker available. This system would have a disastrous affect on a new trucker.

This new system was partially designated to enable the Petitioner-Nu-Car to save on the cost of health care, welfare, and pension benefits. None of these benefits were available to the Respondent-Varnum, as he was not an employee, or member of the Union, at the time of these representations and negotiations.

The representative of the Petitioner-Nu-Car knew of the proposal regarding change in dispatch systems during the employment negotiations, yet failed to inform the Respondent-Varnum of the pending change. The deposition of Paul McAllister, at 73-79; Affidavit of Paul McAllister, at 1-2.

More significantly, the representative knew that if the change was implemented this representation that the Respondent-Varnum might earn $7,000.00 per month would be false.

On June 2, 1983, the Respondent-Varnum began work for the Petitioner-Nu-Car. After June 27, 1983, the Petitioner-Nu-Car and the Union began to renegotiate the Collective Bargaining Agreement. These negotiations resulted in a new agreement, concluded on about July 8, 1983, which implemented a change in the dispatch procedure to a seniority-based system. When the new dispatch system was then put into effect, the Respondent-Varnum's income fell drastically. Thereafter, in March, 1984, the Respondent-Varnum resigned from the Petitioner-Nu-Car's employment with a financial loss of approximately $85,000.00.

In November, 1984, the Respondent-Varnum filed a Complaint against the Petitioner-Nu-Car in Florida State Court alleging that the Petitioner had fraudulently misrepresented to him the conditions of employment in order to induce him to accept employment. The Respondent sought compensatory and punitive damages. In December, 1984, the Petitioner-Nu-Car removed the action to the United States District Court for the Middle District of Florida, based on diversity of citizenship.

In June, 1985, the Petitioner-Nu-Car moved for Summary Judgment on the grounds that the Respondent's Complaint was preempted by Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. Section 185, and by the National Labor Relations Act, 29 U.S.C. Section 151-169. On October 22, 1985, the District Judge granted the Petitioner's Motion for Summary Judgment.

On November 20, 1986, the Eleventh Circuit rendered an opinion reversing and remanding the case to District Court on the grounds that the Respondent's Complaint was not preempted by Section 301 of the Labor-Management Relations Act,

citing *Belknap, Inc. v. Hale,* 463 U.S. 491, 509-511 (1983). In addition, the Appeals Court rejected the Petitioner's argument that the Respondent's Complaint was preempted under Section 9(a) of the National Labor Relations Act ("NLRA"), which prohibits employers from "direct dealing" with individual employees in the absence of the majority designated collective bargaining representative.

It is undisputed that at the time the representations were made to the Respondent-Varnum, by representatives of the Petitioner-Nu-Car, that the Respondent, was *not* an employee of the Petitioner, *nor* was the Respondent a member of a collective bargaining unit.

REASONS FOR DENYING THE WRIT

The decision of the Eleventh Circuit is *not* in conflict with the United States Supreme Court or various Courts of Appeals decisions concerning the preemption of State Common Law actions for tort by Section 301 of the Labor-Management Act.

Specifically, the Petitioner has misconstrued the United States Supreme Court decision in *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985), in that the instant case, to-wit: common law action in tort, is *not* based on an interpretation of the collective bargaining agreement. As such the Respondent's complaint is *not* "inextricably intertwined", dependent or affected by the terms of the collective bargaining agreement.

In addition, the Eleventh Circuit's decision does not conflict with the National Labor Relations Act, "Preemption Doctrine", established by the United States Supreme Court in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959). The Eleventh Circuit specifically states that its decision is *not* based on a finding of a duty on the part of employers

to reveal contemplated collective bargaining proposal to *prospective employees.*

I. THE RESPONDENT'S CAUSE OF ACTION FOR FRAUDULENT MISREPRESENTATION IS NOT PREEMPTED BY SECTION 301 OF THE LABOR-MANAGEMENT RELATIONS ACT

The decision of the Eleventh Circuit is *not* in conflict with the United States Supreme Court's decision in *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202 (1985).

In *Lueck,* 471 U.S. AT 105 S.Ct. 1904, an employee brought a State Law tort action against an employer and insurer seeking recovery for alleged bad faith in handling a claim pursuant to a nonoccupational disability insurance plan included in a collective bargaining agreement. There, the Supreme Court declared that the right being asserted was not only derived from a contract, but was defined by the contractural obligation of good faith.

In the present case, the conduct of which the Respondent complains, to-wit: fraudulent misrepresentations to a prospective employee, is totally outside of any contractural obligation. Further, it is clear that the right being asserted here is not derived from a contract, nor would it require any analysis of the contract. Instead, the right being asserted is totally outside of the collective bargaining contract for at the time the fraudulent misrepresentations were made the Respondent-Varnum was neither an employee of the Petitioner-Nu-Car, nor a member of a collective bargaining unit.

This fact that the proscribed conduct or rights sought to be established by the Respondent are clearly independent of a labor contract is totally supported by the Supreme Court decision in *Lucek:*

> "In extending the pre-emptive effect of Section 301 beyond suits for breach of contract, it would be *inconsistent* with Congressional intent under that Section to preempt States Rules that proscribe conduct, or establish rights and obligations *independent of a labor contract.*" (emphasis added) Also see *Malone v. White Motor Corp.*, 435 U.S. 497, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978).

Therefore, the facts of the instant case do not support the Petitioner's argument that the Respondent's claim is in any way dependent or meshed with the collective bargaining agreement.

The Eleventh Circuit's decision is not in conflict with other Courts' of Appeal decisions which have based, on *different facts,* preempted State tort actions under Section 301. The Petitioner's reliance on *Bale v. General Telephone Company of California,* 795 F. 2d 775 (9th Cir. 1986), is inapplicable for its based on different facts. Yet, the Petitioner urges it's application. In *Bale,* the plaintiffs did *not* appeal the District Court's entry of Summary Judgment on their Section 301 and State contract claims. More importantly, the basis of the Plaintiff's claims in *Bale,* was premised on a comparison, analysis and interpretation of the collective bargaining agreement. Such is not required in the instant case. Instead, as admitted by the Petitioner:

> "...At the time these representations (fraudulent misrepresentations), were made, they were entirely true and, indeed, accurately reflected the existing terms of the collective bargaining agreement between Nu-Car and the Union." Petition p.4.

Therefore, at no time is the Respondent asserting that his claim has any relation whatsoever to the collective bargaining agreement. The Eleventh Circuit Court held that the District Court misconstrued the essence of the Respondent's complaint.

This misconstruction is now being urged by the Petitioner in its present Petitions.

What is important, as found by the Eleventh Circuit is that the Respondent's Complaint did not go to the terms of employment covered by the collective bargaining agreement. Instead, the complaint involved the Respondent's conduct *prior to* the Respondent accepting employment. Petitioner's Appendix at A7.

Likewise, the Petitioner's reliance on *Gibson v. AT&T Technologies, Inc.*, 782 F.2d 686 (7th Cir. 1986), and *Eitmann v. New Orleans Public Service, Inc.*, 730 F. 2d 359 (5th Cir. 1984), is inapplicable. In *Gibson*, the plaintiffs at the time which they were withheld information concerning plans to close a plant were *employees* of the employer-defendant. As employees, and as members of a collective bargaining unit, they were clearly within the jurisdiction of Section 301(a). In the instant case, the Respondent was *not* a party to a labor agreement, therefore, the "Preemption Doctrine" does not apply.

Also, it is clear that the Eleventh Circuit's decision in this case does *not* conflict with the decision of the Fifth Circuit rendered in *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359 (5th Cir. 1984). There, the plaintiff filed suit in State Court alleging breach of an individual contract of employment. The present Respondent is *not* alleging breach of any contract, but instead, alleges that prior to his employment, and prior to his representation by any collective bargaining unit, the Petitioner-Nu-Car failed to inform him of the impending change as a means to induce him to accept employment. As found by the Eleventh Circuit, "Because the complaint focused on conduct that occured *prior to* the Plaintiff's accepting employment, the case is distinguishable from *Eitmann*, and is not preempted by Section 301."

In *Belknap, Inc. vs. Hale*, 463 U.S. 491, 509-511, 103

S.Ct. 3172, 3182-83, 77 L.Ed.2d 798, the Supreme Court upheld a State law action for fraudulent misrepresentation by employees who had replaced strikers and were subsequently discharged. Although the plaintiffs had been told *prior to* their accepting employment that they would be permanent replacements, this was *not* preempted by Federal Labor Laws. Petition's Appendix at A6-7. The Supreme Court's decision in *Belknap* is the controlling authority in the instant case.

II. THE RESPONDENT'S CAUSE OF ACTION FOR FRAUDULENT MISREPRESENTATION IS NOT PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT, AND DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *SAN DIEGO BUILDING TRADES COUNCIL V. GARMON,* OR WITH THE DECISIONS OF OTHER FEDERAL COURT'S OF APPEALS APPLYING *GARMON* TO SIMILAR CASES.

The Eleventh Circuit correctly held that the Respondent State fraud claim was *not* subject to the NLRA Preemption Doctrine as set forth in *San Diego Building Trades Council v. Garmon,* 395 U.S. 236 (1959).

In essence, the Petitioner would seek to misconstrue the intent of the Federal Labor Law.

The Eleventh Circuit found that at the time the Petitioner's representative told the Respondent that drivers' typically grossed $7,000.00 per month, and that he (the Petitioner's representative) knew that the company was planning to propose a change in the dispatch system under which new drivers, such as the Respondent, would earn substantially less. The Eleventh Circuit further found that pursuant to Florida Law, such a representation regarding what the Respondent would expect to earn, in the absence of any disclosure regarding the impending

change could have been fraud. *Hamlen v. Fairchild Industries, Inc.*, 413 So. 2d 800 801 (Fla. 1st CDA 1982). Such an issue therefore, was an issue for the trier fact to decide. Petitioner's Appendix at A8-9.

Therefore, it is *not* that the "representations" are conduct controlled by the NLRA and require an interpretation of an existing labor agreement, but instead, that the "representations" are false statements made to a non-employee and non-union member and as such are actionable under State Law pursuant to the *Garmon Doctrine. Lynn v. Plant Gard Workers*, 383 U.S. 53, 15 L.Ed.2d 582 (1966).

Although not cited by the Petitioner, such conduct involving a common law tort has been held *not* to be preempted by Federal Law where the type of behavior or conduct, such as the instant case, i.e., fraudulent misrepresentations, create an independent tort which is actionable under State Law. *Farmer v. Carpenters*, 430 U.S. 290, 51 L.Ed.2d 338 (1977); *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 56 L.Ed.2d 209 (1978).

Finally, even assuming *arguendo* that the conduct complained of, i.e., fraudulent misrepresentations, did occur in the context of prospective employment, such conduct has been held to remain a part of the self-help remedy of the State causes of action and is not preempted by Federal Law. To do otherwise, the Supreme Court has declared, would leave the employer and union free to use their own economic weapons against one another and thereby free to injure innocent third parties, i.e., non-employees and non-union members, such as the Respondent. *Machinest v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 49 L.Ed.2d 396 (1976).

CONCLUSION

Based on the foregoing reasons, and authority as cited, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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